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IN THE

Supreme Court of the United States

October Term, 1957

No. 316

HELEN E. COTTRELL,

Appellant,

—v.—

THE PAWCATUCK COMPANY (formerly the C. B. Cottrell & Sons Company) a Delaware Corporation (known as the Old Company), HARRIS-SEYBOLD COMPANY, a Delaware Corporation, DONALD C. COTTRELL, RIDLEY WATTS, ARTHUR M. COTTRELL, JR., CHARLES P. COTTRELL, JR., and THE COTTRELL COMPANY, a Delaware Corporation (known as the New Company),

Appellees.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL

EDWARD J. ENNIS,
165 Broadway,
New York, New York,
Attorney for Helen E. Cottrell, Appellant.

Of Counsel:
DOUGLAS W. TROLL,
909 Shipley Street,
Wilmington, Delaware.

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APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS APPEAL

This brief is filed by appellant so as to be helpful to the Court in correcting the erroneous statements contained in Appellees' Motion to Dismiss and Brief in support thereof.

I.

The appeal should not be dismissed for lack of jurisdiction.

Appellees suggest that this Court lacks jurisdiction because "• • • there was no decision in the Supreme Court of Delaware holding the statute in question valid" (A. p. 5).*

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* Note: Reference to Appellant's Jurisdictional Statement will be thus: JA p. 1. Reference to Appellees' Motion to Dismiss and Brief in Support Thereof will be thus: A. p. 1.

As to appeals under 28 U. S. C. § 1257(2), the validity of the state statute should be drawn in question and the decision should be in favor of its validity.

The purpose of this requirement is to restrict the United States Supreme Court's mandatory jurisdiction on appeal. No judgment of a state court will be reviewed on appeal by the Supreme Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds, or, when the statute as applied, is so assailed until it has opportunity authoritatively to construe it. In order to support an appeal to this Court it is necessary that the validity of the state statute "has either been presented for decision to the highest court of the state • • • or has in fact been decided by it • • •." *Wilson* v. *Cook*, 327 U. S. 474, 480-482 (1946).

Granted there is no explicit decision by the Delaware Supreme Court on the validity of this state statute, its decision nevertheless amounts to a holding of validity by implication.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282,
Largent v. *Texas*, 318 U. S. 418.

In accordance with the appeal procedure in Delaware, the question was presented by appellant in her initial brief. It was amplified in her reply brief filed in response to appellees' brief discussing the question.

Thus the Delaware Supreme Court was apprised of the question and by its refusal to consider the question has by implication sustained the validity of the statute.

II.

In any event the appeal papers should be regarded and acted on as a petition for certiorari. (28 U. S. C. § 2103.)

Where it is not apparent to the Court that there was a decision holding the state statute valid,[1] or that validity could be presented as a question for the first time on appeal to the highest state court,[2] this Court has treated the appeal papers as a petition for writ of certiorari.

[1] *Wilson* v. *Cook*, *supra*, at p. 482.

[2] *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942).

In *Memphis Gas Co.* v. *Beeler*, *supra*, Mr. Chief Justice Stone, delivering the opinion of the Court, noted that appellant had failed to establish that under the state procedure a challenge to a statute's validity could be availed of if advanced for the first time before the highest state court, and further, that the decision of that court was void of any reference to such a challenge. He added:

> "Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari; as required by section 237(c) of the Judicial Code as amended, 28 U. S. C. § 344(c), 28 U. S. C. A. § 344(c), certiorari is granted and we proceed to consider the merits of the case." (315 U. S. at p. 651)

III.

Petition for certiorari should be granted because of the conflicts of law and the importance of the issues involved.

Without elaborating unduly the grounds set forth in the appellants' Jurisdictional Statement, it is noted that adequate grounds for the granting of petition for certiorari exist in this case because of a substantial question of conflict between the rulings of this Court and the law of the State of Delaware, and because of the importance of the issues involved.

1.

Conflicts

This Court has determined in *Geddes* v. *Anaconda*, 254 U. S. 590 (1921), that unanimous consent of stockholders is necessary to the sale of the assets of a profitable corporation. This is so because of an implied contract among the stockholders that a corporation will pursue its chartered purpose.

The legislature of Delaware has by 8 Del. C § 271, attempted to authorize the substitution of majority for unanimous consent in such cases.

Appellees have told this Court that the legislature of Delaware can, with the added blessing of Delaware case law, invade this contract right of stockholders because "• • • the reserved power of the state is all embracing • • •" (A. p. 14). Approving authorities, including Delaware cases, are cited, while note is made that the New Jersey view in *Allen* v. *Francisco Sugar Co.* (N. J. Ct. Er. & App. 1921) 29 N. J. Eq. 431, 112 A. 887, is contrary.

Appellees would have the Court affirm a usurpation of power by the state legislature under the guise of "reservation".

Such power is not conceivable for it would amount to power of circumventing the United States Constitution.

2.

Importance

The questions raised by appellant are of substantial importance.

There is a direct State challenge to the Constitution of the United States; broad matters of corporate action are involved, as are immediate, substantial property interests; and a litigant has been unreasonably denied a judicial consideration of a question that goes to the very root of the case.

As to the latter, no doubt exists that this Court has the power to examine into the raising of the Federal question to determine if the highest state court's refusal to deal with that question is a mere evasion.

Rogers v. *Alabama*, 192 U. S. 226.

If the Court is convinced that the highest state court's refusal to consider a federal question amounts to an avoidance of the federal right, it may assume jurisdiction.

Williams v. *Georgia*, 349 U. S. 375.

As Mr. Justice Frankfurter in *Williams* v. *State of Georgia*, said,

> "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power.[6] The principle is clear enough. But the unique aspect of the never-ending new cases that arise require its individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we

are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right? A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." (349 U. S. at p. 382)

The Supreme Court of Delaware attempted to evade a determination of the validity of the state statute, 8 Del. C. § 271, as against the United States Constitution, by a completely unreasonable limitation of its own previously announced rule.

The question of constitutionality was raised on appeal by appellant, briefed by both appellant and appellees, and was a matter of law not dependent on the facts. It was, in effect, nothing more than a further ground of illegality which formed the basis of her suit.

She sought rescission of the contract because of its illegality for the reason that the action of the directors and majority stockholders amounted to deliberate disregard of the minority's interest or a reckless indifference thereto. The basis of this illegality was that the consideration of $3,116,070 was grossly inadequate being:

1. less than 1/4 of the insurance value of $13,000,000;

2. less than 1/3 of the replacement cost of $10,400,000;

3. less than 2/5 of the going concern value of $7,700,000;

4. less than 2/5 of the book value plus good will of $7,250,000;

5. less than 3/5 of the liquidation value of $5,110,000.

The Supreme Court of Delaware acting as an appellate court for appeals from the Court of Chancery acts *de novo*; in short, it has full power to consider the case as if raised in its Court for the first time.

Weinberg v. *Baltimore Brick Company* (Del. Supreme Ct. 1955) 112 A. 2d 517.

Its power, therefore, is full and it may consider such questions if it desires to. In 1950 it apparently limited its discretion by adopting a rule that it will not consider questions not considered below except questions involving jurisdiction and public policy.

Rickards v. *State* (Del. Supreme Ct. 1950), 6 Terry 573, 77 A. 2d 199.

Mr. Justice Wolcott stated the general rule in the *Rickards'* decision noting the two exceptions. He went on to state that a question of constitutional guarantee never before considered by the Court could be raised for the first time on appeal under the public policy exception. He did not say that this would be limited to criminal cases, adding in fact a citation to a New Jersey case, *Walter* v. *Keuthe*, 98 N. J. L. 828, 121 A. 624, which concerned a civil matter.

The same Mr. Justice Wolcott, a member of the Court deciding the instant case, in a later case, *Kerbs* v. *California Eastern Airways* (Del. Supreme Ct. 1952), 90 A. 2d 652, speaking for the Court in 1952, allowed a statute to be considered for the first time in the case on the ground that as illegality was generally claimed below, this only added an additional ground thereof.

The same Mr. Justice Wolcott, along with the same members of the Court deciding appellant's case, as late as 1955 held, in *Weinberg* v. *Baltimore Brick Co.*, *supra*, that on appeals from the Court of Chancery the Supreme

Court of Delaware has power to fully examine the entire record to determine the correctness of the result reached below and may therefore, decide issues not reached below. The Court, *Per Curiam*, said,

> "Appellants move to strike the brief as improper, contending that upon appeal from the denial of a preliminary injunction, even though the decision settles rights, only the precise question decided by the court below is before us for review.
>
> This contention is unsound. On appeal from Chancery this Court has power to examine the entire record for the purpose of determining the correctness of the result reached below. It has therefore power to decide issues not reached below." (112 A. 2d 517)

Of equal importance here is that the Court was not consistent under its *Rickards* rule. It did not allow appellant to raise the constitutional question on the ground of its not having been raised below, but in the same breath, allowed her to question for the first time the Chancellor's decision on the point that he had not added the liabilities to the capital earnings value in determining final value though that objection was not made by appellant below. The Supreme Court considered this point stating,

> "Finally, plaintiff argues that the Chancellor failed to take into account, in arriving at an evaluation of the assets sold, the Old Company's liabilities. This argument we are unable to follow." (JA p. 31)

• • •

This question is of greatest importance to this case, for if the statute is illegal, action thereunder is equally so, leaving a contract of sale of no validity.

The really serious point is: just what is the Delaware rule on raising questions for the first time on appeal; and has not the court in fact refashioned the rule to eliminate the plaintiff!

• • •

Appellees state that this alleged violation of the Fourteenth Amendment by refusal to consider the constitutional point should have been presented in appellant's petition for re-argument.

Granting that appellant made no specific reference to the 14th Amendment of the United States Constitution in her petition for re-argument, the very wording of the petition was of itself a clear indication to the court that she felt its decision was unreasonable (text of petition appears in A-appendix 1, pp. 21-26).

Appellant therein indicated the complete unreasonableness of the Court's failure to apply the *Rickards* rule, adding that no compelling reason existed for such denial when the point was a matter of law, not dependent on the facts, and fully briefed by both parties. These are the same reasons appellant now puts forth as establishing unconstitutionality.

The Delaware court was in effect fully apprised of the matter as required by the rule of *Wilson* v. *Cook, supra.*

There is nothing that she could have added thereto except the words—"violation of the 14th amendment." There is no valid reason to assume that such an incantation would have in any way altered the court's opinion.

The petition having alleged the same grounds appellant now uses to support unconstitutionality, its denial by the Delaware court equals as a practical matter a denial of the consideration of her Federal right.

Here the unexpected opinion of the court on this point, followed by an equally unexpected denial of reargument, amount for all practical purposes to a cut off of appellant's right to have this question heard. To deny her the chance to raise the question now would be in the words of Mr. Justice Holmes—"a mere concession to technicality."

Saunders v. *Shaw*, 244 U. S. 317, 319 (1917).

• • •

Conclusion

The unconstitutionality of the Delaware statute as applied to a profitable corporation has not been raised before as, almost without exception, the cases concerned the sale of assets of unprofitable corporations. There is no doubt existing that in such cases majority stockholders' consent is sufficient.

This case squarely poses the question of the applicability of such a statute to a profitable corporation.

The issue is of such importance that it must be met.

WHEREFORE, appellant respectfully moves that appellees' Motion to Dismiss be denied and appellant's appeal be granted.

Respectfully submitted,

EDWARD J. ENNIS,
165 Broadway,
New York, New York,
Attorney for Helen E. Cottrell, Appellant.

Of Counsel:

DOUGLAS W. TROLL,
909 Shipley Street,
Wilmington, Delaware.